NO. 92-1252

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1992

TRACEY JEAN CRANE,

Petitioner,

- against -

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Have the courts of the Commonwealth of Pennsylvania violated Petitioner's federally protected right against double jeopardy as set forth in the Constitution of the United States of America, and as enunciated in Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), by allowing Petitioner to be prosecuted for homicide where the Commonwealth will rely on Petitioner's conduct for which she has already been tried and convicted of aggravated assault?

2. Have the courts of the Commonwealth of Pennsylvania impermissibly lessened the threshold of protection provided by the Double Jeopardy Clause of the Constitution of the U.S. and as enunciated in Grady v. Corbin, by interpreting the Double Jeopardy Clause of the Constitution of the Commonwealth of Pennsylvania as allowing a homicide prosecution when the Commonwealth will rely on Petitioner's conduct which is the same conduct for which she has already been tried and convicted of aggravated assault?

3. Does Section 110 of the Pennsylvania Crimes Code violate the Double Jeopardy Clause of the United States Constitution as enunciated in Grady v. Corbin?

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NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1992

TRACEY JEAN CRANE,

Petitioner,

- against -

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

The Petitioner, Tracey Jean Crane, respectfully prays that a Writ of Certiorari issue to review the judgment of the Pennsylvania Supreme Court which denies Petitioner of her federally protected right against double jeopardy as set forth in the Constitution of the United States of America, and as enunciated in Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d

548 (1990), by permitting the Commonwealth of Pennsylvania to bring a homicide prosecution against the Petitioner when the Commonwealth will rely on Petitioner's conduct which is identical to the conduct for which she has already been tried and convicted of aggravated assault.

OPINIONS BELOW

The Supreme Court of Pennsylvania entered an Order dated October 6, 1992, and is attached hereto as Appendix A.

The Judgment of the Superior Court of the Commonwealth of Pennsylvania dated June 5, 1992 and accompanying Opinion are attached hereto as Appendix B.

The Order dated May 24, 1991, by the Court of Common Pleas, Warren County, Criminal Division, of the Commonwealth of Pennsylvania and accompanying Opinion are attached hereto as Appendix C.

JURISDICTION

The Supreme Court of Pennsylvania, the court of last resort in the Commonwealth of Pennsylvania, denied the Petitioner's Petition for Allowance of Appeal on October 6, 1992. A true and correct copy of this Order is set forth in Appendix A.

This Court's jurisdiction is invoked under Title 28, U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of Constitution of the United States of America is set forth in Appendix D.

Article I, Section 10 of the Constitution of the Commonwealth of Pennsylvania is set forth in Appendix E.

Section 110 of the Commonwealth of Pennsylvania Crimes Code is set forth in Appendix F.

STATEMENT OF THE CASE

This Appeal concerns the denial of the Petitioner's request to quash a Criminal Complaint charging her with homicide and is based on the principles of double jeopardy.

The Petitioner, Tracey Jean Crane, is the natural mother of Leslie Michael Crane, who was born on October 16, 1987. Leslie Michael Crane suffered a head injury in December of 1988. As a result of that incident, a criminal action was filed by the Commonwealth of Pennsylvania against Tracey Jean Crane at No. 193 of 1988 in Warren County charging her with three counts of aggravated assault, three counts of endangering welfare of children, and three counts of recklessly endangering another person. A jury trial was conducted from November 29, 1988 through December 1, 1988 before the Honorable Robert L. Wolfe, P.J. The jury found the Petitioner guilty of three counts of aggravated assault (felony - 1st degree) and one count of endangering the welfare of a child (misdemeanor -

2nd degree). On March 10, 1989, the Petitioner was sentenced to a prison term at Muncy State Correctional Facility for a minimum of six years to a maximum of twenty years. The Petitioner pro se, filed a Notice Of Appeal in the Superior Court of Pennsylvania at No. 927 PGH 1990 on July 27, 1989. On July 24, 1990, the Superior Court denied the Petitioner's appeal as untimely.

Leslie Michael Crane died on June 23, 1990. On or about June 26, 1990, a criminal homicide action was initiated against Tracey Jean Crane alleging that Leslie Michael Crane died as a result of "blunt force trauma to the head" which occurred in 1987. This action is No. 272 of 1990 in the Court of Common Pleas of Warren County, Pennsylvania. On or about September 17, 1990, the Petitioner caused a Motion for Bill of Particulars to be filed upon the Commonwealth. The Bill of Particulars attempted to elicit from the District Attorney any and all facts which would be presented at the time of the homicide trial. More specifically, the Bill of

Particulars requested the District Attorney to identify the facts which were presented at the prior aggravated assault trial and disclose any additional facts which would be presented at the homicide trial. Attached hereto and marked Appendix G, is a true and correct copy of the Bill of Particulars. The Commonwealth filed an Answer to the Bill of Particulars on or about February 4, 1991. The response sets forth that the conduct which was the basis of the aggravated assault conviction would be the conduct presented at the homicide trial. In particular, in response to question 4, the Commonwealth admitted that "no additional conduct of the Defendant will be relied upon by the Commonwealth. . . ." In response to question 6, wherein the Petitioner requested the Commonwealth to set forth any facts which will be utilized at the homicide trial which were not presented at the aggravated assault trial, the Commonwealth responded that "the injuries to L. C. created a condition of blunt force trauma to the head which caused

L. C.'s life to diminish to the point that he could only live by mechanically/induced mechanisms designed to prolong his life. Without those life support systems, L. C. died." Attached hereto find a true and correct copy of the Answer to Motion for Bill of Particulars marked Appendix H.

Based on the above response, on March 15, 1991, the Petitioner filed an Omnibus Pretrial Motion requesting the Court to quash the prosecution based upon the principles of double jeopardy, requesting the recusal of Judge Robert L. Wolfe and presenting notice of a mental infirmity defense. A hearing on the Omnibus Pretrial Motion was held April 2, 1991, before the Honorable Judge Wolfe. On April 4, 1991, an Order was filed whereby Judge Wolfe recused himself. The Honorable James B. Dwyer, Senior Judge was assigned to this case. Argument on the remaining issues in the Omnibus Pretrial Motion occurred on May 16, 1991. After argument, Judge Dwyer entered an Order on May 24, 1991, holding

that the charge of homicide is not quashed and the District Attorney's office shall process the case for trial.

The May 24, 1991 Order was appealed to the Superior Court of Pennsylvania at No. 272 of 1990. The Superior Court entered a Judgment and Opinion dated June 5, 1992, affirming Judge Dwyer's Order. The Petitioner timely filed a Petition for Allowance of Appeal on July 6, 1992, before the Supreme Court of Pennsylvania, Western District. The Petition for Allowance of Appeal was denied by Order dated October 6, 1992.

As a result of this Order of the Supreme Court of the Commonwealth of Pennsylvania, the Petitioner files the within Petition for Writ of Certiorari for consideration by this Honorable Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this matter for two reasons. This Court should grant a Writ of Certiorari in order to review the application of Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), to the facts in the instant case to insure that the Commonwealth of Pennsylvania is providing its citizens with the required protection of the double jeopardy clause as set forth in both the Constitution of the United States of America as well as the Constitution of Pennsylvania. The case at bar also enables this Honorable Court the opportunity to address a question raised in the Grady v. Corbin opinion. The Grady Court, in footnote 7, notes a possible exception to the application of the Double Jeopardy Clause. This possible exception concerns the situation "where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain the charge have not occurred...." Citing, Brown v. Ohio, 432 U.S.

161, 169 and n.7, 97 S.Ct. 2221, 2227, and n.7, 53 L.Ed.2d 187 (1977). Unlike the Grady case, the case at bar provides this precise factual situation. Therefore, this case provides an opportunity for this Court to establish the appropriate method of application of the Grady analysis in the above described factual situation.

The decision of Grady v. Corbin has clearly and substantially changed the evaluation which a court must make in applying the Double Jeopardy Clause. See, U.S. v. Salerno, 964 F.2d 172, 176 (2d Cir. 1992) The Grady test has basically required a Court to first apply the Blockburger[1] test. However, Grady reasons that the Blockburger test is not the end of a Court's analysis. Rather, the Grady test states that even if the Blockburger test is not met, the Double Jeopardy Clause will still bar a subsequent prosecution where the prosecutor, "to

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[1]Blockburger v. U.S., 284 U.S. 299, 52 S.Ct. 180 (1932)

establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady v. Corbin, 495 U.S. at 521, 110 S.Ct. at 2093 (Emphasis added). It has been already recognized that this second test has provided difficulties in application and interpretation. See, U.S. v. Felix, _____ U.S. _____, 112 S.Ct. 1377, 18 L.Ed.2d 25 (1992), Sharpton v. Turner, 964 F.2d. 1284, 1287 (2d Cir. 1992)

In the case at bar, the Petitioner believes that the Blockburger test is sufficient to establish that the Double Jeopardy Clause should prohibit prosecution of the homicide case. The Petitioner has already been tried and convicted of aggravated assault. It is axiomatic that the offense of aggravated assault is a lessor included offense of the homicide charge and therefore, the subsequent prosecution should be denied.

However, even to the extent that the

subsequent prosecution is not barred by the Blockburger test, the protection afforded by the Grady analysis would clearly prohibit Petitioner's homicide prosecution. The Bill of Particulars in this matter was obviously drafted to elicit a response which will make clear the applicability of the Grady analysis to this case. The Commonwealth was given every opportunity in the Motion for Bill of Particulars to set forth any conduct which was not relied upon during the aggravated assault trial and which it intended to present at the homicide trial. Despite this clear opportunity, the Commonwealth's Response indicates that it is solely the conduct which resulted in the conviction at the first trial which would be presented at the homicide trial. The Commonwealth explicitly states in response to question no. 4 that there is no additional conduct which will be relied upon by the Commonwealth. Rather, the only additional evidence which will be presented is the death of the child. Thus, it is clear that the identical

conduct which was the basis of the first conviction will be the precise and identical conduct presented at the homicide trial. Accordingly, the subsequent prosecution should be prohibited, in accordance with Grady.

In the instant matter, the courts in the Commonwealth of Pennsylvania have ignored a determination based on the Blockburger test. Rather, the courts have immediately attempted to rely on the exception to the applicability of the Double Jeopardy Clause as stated in Brown, infra. However, in the court's stated rational, they have entirely ignored the Grady analysis. Instead, the courts have utilized pre-Grady decisions in denying the Petitioner the protection to which she is entitled under the Double Jeopardy Clause. The Superior Court of Pennsylvania has relied on a series of cases wherein it notes that Pennsylvania law allows a subsequent homicide trial to occur "where the victim was still alive on the day the defendant was convicted of" the first and underlying

offense. See, Commonwealth Ex Rel Pappy v. Maroney, 417 Pa. 368, 207 A.2d 814 (1965), Commonwealth v. Washington, 481 Pa. 474 393 A.2d 3 (1978), and Commonwealth v. Williams, 348 Pa. Super. 328, 502 A.2d 227 (1985). The Superior Court of Pennsylvania has also noted that 18 Pa.C.S.A. Section 110 allows the Commonwealth to bring a "second prosecution" if the "second offense was not consummated when the former trial began". See, 18 Pa.C.S.A. Section 110 (iii)(b).

The Petitioner herein asserts that the above analysis by the Pennsylvania courts must be reconsidered in the light of Grady. The impact of Grady is of such significance that the precedence and Crimes Code section relied upon by the Courts of the Commonwealth of Pennsylvania are no longer the appropriate standard in ascertaining the limits of the protection afforded by the Double Jeopardy Clause. Accordingly, this Honorable Court should grant the Writ of Certiorari in order to make clear the intent and application of Grady, and to provide

the citizens of Pennsylvania with the Constitutional protection to which they are entitled.

This Honorable Court should also grant a Writ of Certiorari in this case in order to clarify the possible exception which this Court raised in the Grady opinion, in footnote 7. Footnote 7 states:

> We recognized in Brown v. Ohio, 432 U.S. 161, 169, and n.7 (1977), that when application of our traditional double jeopardy analysis would bar a subsequent prosecution, '[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. See Diaz v. United States, 223 U.S. 442, 448-449, [32 S.Ct. 250, 251, 56 L.Ed 500] (1912), Ashe v. Swenson, 397 U.S. 436, 453, n.7 90 S.Ct 1189, 1194, n.7, 25 L.Ed.2d 469 (1970) (BRENNAN, J., concurring).' (Emphasis added).

This footnote is concluded by the Court acknowledging that the present fact situation was not under consideration in Grady because the District Attorney knew of the death on the night of the accident. However, the question remains as to the effect of this footnote on the Court's

analysis and holding, as applied to the case at bar.

Initially, it is necessary to note that the language cited from Brown v. Ohio, by the Grady Court, is itself contained in a footnote in the Brown v. Ohio case. This was not the holding in the Brown v. Ohio case, but rather a reference that Brown v. Ohio did not overrule the cases cited therein, to-wit: Diaz v. U.S. and Ashe v. Swenson, infra. Further, it must be noted that the Court in Brown v. Ohio used the permissive language "may" instead of the mandatory "shall". Accordingly, it must be recognized that this exception has not been adopted by the Court but merely raises a possible question which can only be answered when properly presented to the Court. Of extreme importance is the Brown v. Ohio Court's reliance on the case of Diaz v. U.S., 223 U.S. 442, 32 S. Ct. 250, 56 L.Ed 500 (1912). The Diaz case concerned the law of the Philippine Islands. The double jeopardy portion of the case concerned an incident which occurred on May 30,

1906, when the defendant committed an assault upon a victim. The day after the assault the defendant was charged with assualt and battery before the Justice of the Peace. On June 26, 1906, the victim died and the defendant was then charged with homicide. The Court, in addressing the double jeopardy issue, recognized that it protected a defendant from a second jeopardy which was "for the same offense" as the first. The Court proceeded to determine that the assault and battery and the homicide, although "identical in some of their elements, were distinct offenses both in law and in fact." The Court noted that:

> under the Philippine law, the Justice of the Peace, although possessed of jurisdiction to try the accused for assault and battery, was without jurisdiction to try him for homicide; and, of course, the jeopardy incident to the trial before the justice did not extend to an offense beyond his jurisdiction. Diaz, 223 U.S. at 448, 332 S.Ct. at 251.

Thus, the first test applied by the Court, the same offense test, appears to be an analysis which would ultimately be set forth as "the

Blockburger test." This is precisely the test which is discussed in Grady and which forms the initial step in the Grady analysis. Accordingly, it is suggested that if the only basis for the continued validity of Diaz is the Court's first analysis, i.e. "the same offense test," a different result in Diaz should occur post-Grady since Grady included a "second step" in determining the applicability of the Double Jeopardy Clause. Diaz continues to be viable law only because of the "jurisdictional analysis". It is clear that because the Justice of the Peace lacked jurisdiction, Diaz was never placed in jeopardy for the homicide. Therefore, the second prosecution was deemed to be permissible in the Diaz case. The facts of the case at bar are different in that the Petitioner herein was tried for aggravated assault, etc., before the Court Of Common Pleas. The very court which convicted and sentenced the Petitioner herein had jurisdiction to hear the homicide charges. Therefore, the Petitioner herein appeared in a court which had

jurisdiction to hear both the former and subsequent prosecution and was therefore placed in jeopardy in contradistinction to Diaz. Thus, while Diaz may continue to be "good law" with respect to its jurisdictional analysis and not overruled by the holding of Brown v. Ohio, it is inapposite in the current situation because of the Blockburger and Grady decisions.

The second authority cited in the Brown v. Ohio footnote is the case of Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189 (1970). However, a review of the case of Ashe v. Swenson reveals that at 397 U.S. 453 the Court states:

> ...the Double Jeopardy Clause requires the prosecution, except in most limited circumstances to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction.

Footnote number 7 in Ashe v. Swenson contains language similar to the footnote 7 in Brown v. Ohio[2] and as authority cites Diaz v. U.S. Thus,

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[2] Footnote No. 7 in Ashe v. Swenson reads in pertinent part as follows:

> For example, where a crime is not completed or not discovered, despite diligence on the part of the

the theoretical question raised by the Grady Court in footnote 7, is never found as the holding or dispositive finding of the United States Supreme Court. Rather, this possible exception to the Double Jeopardy Clause has its basis in the footnotes and not the holding in the case of Brown v. Ohio, Ashe v. Swenson or any other decision of the U.S. Supreme Court. This reflects the Court's attempt to limit the holding in the case under decision and to establish that the case of Diaz v. U.S. is not overruled. However, the Court's holding in chief in Grady clearly reverses one of the underpinnings of the Diaz decision and allows it to remain viable law only on the basis of its discussion of double jeopardy with respect to a jurisdictional basis, as discussed hereinabove.

Accordingly, this Court has not considered the application of the Grady analysis to the

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police, until after the commencement of a prosecution for other crimes arising from the same transaction, an exception to 'same transaction' rule should be made to permit a separate prosecution. See, e.g., Diaz v. U.S., 223 U.S. 442, 448-449, 32 S.Ct. 250, 251, 56 L.Ed. 500 (Emphasis added).

situation where facts occur subsequent to the first trial. Therefore, the case at bar offers an opportunity for this Honorable Court to make a determination as to the application of the Grady test in such a situation which has been unclear since at least the 1912 decision of Diaz.

CONCLUSION

Therefore, in light of the aformentioned reasons and supporting law, this Honorable Court should enter a Writ of Certiorari in order to clarify the application of the Double Jeopardy Clause in the Constitution of the Commonwealth of Pennsylvania as well as to enunciate the standards of the application of the double jeopardy clause when facts occur subsequent to an initial prosecution.

Respectfully submitted:

By: _____
GEORGE C. ENTENMANN, ESQUIRE
Attorney for Petitioner

October 6, 1992

George C. Entenmann, Esquire
ENTENMANN & SANSONE
2222 Lawyers Building
Pittsburgh, PA 15219

In Re: Commonwealth of Pennsylvania v. Tracey Jean Crane No. 0334 W. D. Allocatur Docket 1992

Dear Mr. Entenmann:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

"October 6, 1992
Petition Denied
Per Curiam"

Very truly yours,

DEPUTY PROTHONOTARY

ITG:abg
cc: Maureen A. Plynn, Esquire
Assistant District Attorney
Hon. James B. Dwyer, S.J.

APPENDIX A

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	NO. 1192
	:	PITTSBURGH,
V.	:	1991
	:	
TRACEY JEAN CRANE,	:	
APPELLANT	:	
	:	
	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of WARREN County be, and the same is hereby ORDER AFFIRMED.

BY THE COURTY:

DEPUTY PROTHONOTARY

DATED: JUNE 5, 1992

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
TRACEY JEAN CRANE,	:	NO. 1192 PITTSBURGH, 1991
APPELLANT	:	

Appeal from the Order dated May 24, 1991 docketed May 29, 1991 in the Court of Common Pleas of Warren County, Criminal Division, at No. 272 of 1990.

BEFORE: DEL SOLE, JOHNSON AND FORD ELLIOTT, JJ.

MEMORANDUM: FILED: June 5, 1992

This is an appeal from an order of the Court of Common Pleas of Warren County denying Appellant Tracey Jean Crane's omnibus pretrial motion seeking relief on double jeopardy grounds. Finding no abuse of discretion or error of law, we affirm.

Appellant was charged with three counts of aggravated assault, three counts of endangering welfare of children, and three counts of recklessly endangering another person in connection with an assault she committed on her natural son, Lesley Michael Crane. Appellant was

tried before a jury, found guilty of three counts of aggravated assault and one count of endangering the welfare of a child, and sentenced to six to twenty years imprisonment. Appellant appealed to this court, which dismissed the appeal as untimely. When Appellant's son died as a result of blunt force trauma to the head, sustained in her prior assault on the child, Appellant was charged with criminal homicide. Appellant filed an omnibus pretrial motion requesting the court quash the prosecution based on double jeopardy grounds, requesting the recusal of Judge Robert L. Wolfe and presenting notice of a mental infirmity defense. At the hearing on the motion, a petition was filed and Judge Wolfe recused himself. The case was reassigned to Judge James B. Dwyer, who entered an order refusing to quash the charge of homicide. At the time the homicide charge was brought, a Motion for Bill of Particulars was filed. The Commonwealth's response indicated that "no additional conduct of the defendant will be relied upon by the Commonwealth. The

consequences of the defendant's acts give rise to a sequential wrong which could not have been tried at an earlier time." Appellant thereafter brought this timely appeal.

Before addressing the merits of this appeal, we initially must determine whether this appeal is properly before this court. An immediate appeal from an order denying a pretrial motion to dismiss on double jeopardy grounds is permitted, Commonwealth v. Haefner, 473 Pa. 154, 373 A.2d 1094 (1977), unless the trial court has considered the motion and made written findings that the motion is frivolous. Commonwealth v. Brady, 510 Pa. 336, 508 A.2d 286 (1986). In the instant case, the trial court made no written finding that Appellant's claim was frivolous, but instead chose to review the merits of Appellant's claim. A determination that a defendant's retrial is not barred on double jeopardy grounds is not the equivalent of a determination that a defendant's claim is frivolous, and failure by the trial court to make specific findings regarding frivolousness does not require remand

for such a determination. Commonwealth v. Gains, 383 Pa. Super. 223, 556 A.2d 870 (1989). Therefore, Appellant's claim is not frivolous and this appeal is properly before this court.

Appellant claims that because the conduct which the Commonwealth intends to rely upon at the trial on Appellant's homicide charge is identical to the conduct which formed the basis for Appellant's conviction of the prior charges of assault and endangering the welfare of children, double jeopardy must bar the second prosecution. To determine whether a subsequent prosecution is barred by the double jeopardy clause, the court must apply a two part analysis. See, Grady v. Corbin, 495 U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). The first part employs the traditional test articulated in Blockberger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) i.e., the "same offense" test. Under this test, if the offenses have identical statutory elements, or if one is a lesser included offense of the other, double jeopardy bars the subsequent prosecution. If,

however, the subsequent prosecution is not barred by Blockberger, the inquiry does not end there. The court must then employ the second part of the double jeopardy test found in Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980), i.e., the "same conduct" test. Under this test, the inquiry is whether the government, to establish an essential element of an offense charged in a subsequent prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. The critical inquiry is what conduct the Commonwealth will prove, not which evidence the Commonwealth will use to prove that conduct. Grady v. Corbin, 495 U.S. ___, 110 S.Ct. 2084, 2093, 109 L.Ed.2d 548 (1990). If the Commonwealth relies on the same conduct for the prior and subsequent prosecution, double jeopardy bars the subsequent prosecution. This two part Grady analysis has been adopted by this court in Commonwealth v. LeBelle, 397 Pa.Super. 179, 579 A.2d 1315 (1990). See also Commonwealth v. Bellezza, ___ Pa.Super. ___, ___ A.2d ___ (1992) (No. 01268 Phila. 1991;

filed 2/18/92).

In the instant case, we are asked to decide whether Appellant may be prosecuted for homicide based on the same facts and conduct upon which her aggravated assault conviction was based, when the victim was still alive at the commencement of Appellant's first trial but died later. Under the double jeopardy analysis employed in Grady, it would appear that because the Commonwealth intends to rely upon the same conduct to prove the offense of homicide that it relied upon to prove the offense of aggravated assault, double jeopardy would bar the bringing of the subsequent prosecution. There is an exception, however, which has been recognized by the United States Supreme Court and by the courts of this Commonwealth. In Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the Supreme Court noted in a footnote that:

> An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. See Diaz v. United States, 223 U.S. 442, 448-449, 32 S.Ct. 250, 251, 56 L.Ed. 500 (1912); Ashe v.

> Swenson[1] supra, 397 U.S., at 453 n. 7, 90 S.Ct., at 1199 (Brennan, J. concurring). Id., 432 U.S. at 169, n. 7 (emphasis added).

Applying this exception to the facts in the matter before us, double jeopardy does not bar the subsequent homicide prosecution because the additional fact necessary to sustain that charge had not occurred at the time Appellant was first charged and convicted of aggravated assault. At the time of Appellant's trial on the aggravated assault charge, the victim was still alive. It was not until June 21, 1990 nearly three years after Appellant's infant son was first hospitalized for his head injuries, that his life support system was removed and he was pronounced dead. Therefore, it would have been impossible for the Commonwealth to charge Appellant with homicide at any earlier stage in the proceedings.

Pennsylvania case law also supports the exception noted by the United States Supreme Court in Brown. In Commonwealth ex rel. Papy v. Maroney, 417 Pa. 368, 207 A.2d 814 (1965), the court held that where the victim was still alive

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[1]397 U.S. 436, 90 S.Ct. 1189 (1970)

on the day the defendant was convicted of aggravated assault and robbery but later died, the defendant could still be properly indicted and convicted of the crime of murder. The rationale for the holding was that at the time of the first conviction for assault, the offense of murder had not yet been committed because death had not yet occurred. Id. at 371, 207 A.2d at 816. Additionally, the more recent cases of Commonwealth v. Washington, 481 Pa. 474, 393 A.2d 3 (1978) and Commonwealth v. Williams, 348 Pa.Super, 328, 502 A.2d 227 (1985), both consisting of facts identical to the present case, held that double jeopardy did not bar a subsequent prosecution for murder where the victim was not yet dead at the time the defendant was first charged and convicted with assault. Therefore, based on the foregoing precedent, neither the double jeopardy clause of the U.S. Constitution nor that of the Pennsylvania Constitution bars the subsequent prosecution for homicide in the instant case.

Appellant also contends that since 18

Pa.C.S.A. §110, in conjunction with the rule in Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973)[2], requires that all charges arising from the same criminal episode must be prosecuted in a single trial, the subsequent homicide prosecution cannot be brought. Section 110 of the Pennsylvania Crimes Code also provides, however, that a defendant who has been convicted of one offense may be tried for a second offense arising out of the same incident, if the second offense was not consummated when the former trial began. 18 Pa.C.S.A. §110 (iii) (b). Additionally, we stated in Commonwealth v. Williams, 348 Pa.Super. 328, 502 A.2d 227 (1985) that:

> ... Washington held that double jeopardy and Campana were not violated if a defendant is tried separately for murder after a conviction for lesser offenses which later resulted in the death of the victim. Under 18 Pa.C.S.A. §110(1)(ii), a subsequent

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[2]The Pennsylvania Supreme Court held that because double jeopardy requires a prosecutor to bring all known charges arising from a single criminal episode in the same proceeding, the prosecution of a defendant on a charge stemming from a single criminal episode precluded a subsequent prosecution on another charge arising from the same episode.

> prosecution for any additional offense arising from a single incident is not barred if the additional offense was not known or knowable at the commencement of the earlier trial on the incident.

Williams at 322, 502 A.2d at 229.

Thus, because no death had yet occurred at the time of Appellant's trial for aggravated assault, Appellant's additional offense of homicide was not consummated and not knowable. The instant case falls within the exceptions provided by both case law and §110 of the Pennsylvania Crimes Code. Accordingly, we affirm the trial court order denying Appellant's motion to quash the charge of homicide.

Order affirmed.

IN THE COURT OF COMMON PLEAS
OF THE 37TH JUDICIAL DISTRICT OF PENNSYLVANIA
WARREN COUNTY BRANCH
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	NO. 272 OF 1990
VS.	:	
TRACEY JEAN CRANE	:	

ORDER

AND NOW, to-wit, this 24th day of May, 1991, based on the preceding Opinion, this Court holds that the charge of homicide is not quashed and the District Attorney's Office shall process the case for trial.

Since President Judge Robert L. Wolfe has recused himself, no further order in this regard is necessary.

Concerning the mental infirmity defense, the Defendant may present this to the trial court if she so desires.

BY THE COURT:

_____
James B. Dwyer, Sr. Judge
Specially presiding

APPENDIX C

IN THE COURT OF COMMON PLEAS
OF THE 37TH JUDICIAL DISTRICT OF PENNSYLVANIA
WARREN COUNTY BRANCH
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	NO. 272 OF 1990
VS.	:	
TRACEY JEAN CRANE	:	

OPINION

On March 15, 1991, Defendant filed a post-trial motion raising three points, as follows:

1. Double jeopardy

2. A request for recusal of the trial judge who heard case No. 193 of 1988, which raised the same facts as the instant case, except for the fact of death of the victim.

3. Notice of mental infirmity defense.

This motion was argued before this Court on May 16, 1991, and we shall dispose of these points in the reverse order.

Regarding point number 3, this matter is not ripe at this time for disposition. If a trial is permitted, this point may be submitted to the trial judge at the appropriate time for decision.

Regarding point number 2, this matter is now

moot, as the trial judge is in the earlier case, the Honorable Robert L. Wolfe, P.J., has already recused himself.

As to point number 1, this Court holds that a trial on the charge of homicide against this Defendant does not in any manner involve double jeopardy to this Defendant.

The Defendant was convicted by a jury in November, 1988, for aggravated assault on her natural son. Defendant is presently serving a six to twenty year sentence at Muncy for this crime.

On June 23, 1990, the natural son of Defendant died as a result of the injuries inflicted on him by the Defendant in December, 1987, the same injuries upon which the aggravated assault charge was brought.

The Defendant argues that if she is tried on the homicide charge she would be placed in double jeopardy since the same facts were presented in the assault charge. This argument is incorrect, since an entirely new fact now appears; that is, the death of the victim.

In the instant case, at the time of the trial on the aggravated assault charge, the victim's death had not taken place.

If a death after an aggravated assault - - or even a simple assault - - trial is barred by the double jeopardy rule, the Commonwealth would be reluctant to prosecute anyone for such assault charges for fear that it could not proceed against the defendant if the victim ever died from the injuries sustained by reason of the defendant's actions in causing the victim's death.

Even though all the facts which lead to the conviction on the aggravated assault charge will appear in the trial on the homicide charge, it must be remembered that the important fact of death is now added which could not have been presented at the 1988 trial.

Identical circumstances appear in COMMONWEALTH VS. WASHINGTON, 481 Pa. 474; 393 A.2d 3 (1978), wherein the court held that double jeopardy is not a defense in a homicide case under the facts that appear in the instant case.

FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...Constitution of the United States of America, U.S.C.A. Const. Amend.V

APPENDIX D

ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA

No person shall, for the same offense, be twice put in jeopardy of life or limb; constitution of the Commonwealth of Pennsylvania, Const. art. 1 §10

APPENDIX E

SECTION 110 OF THE COMMONWEALTH OF PENNSYLVANIA CRIMES CODE

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction as defined in section 109 of this title (relating to when prosecution barred by former prosecution for the same offense) and the subsequent prosecution is for:

(i) any offense of which the defendant could have been convicted on the first prosecution;

(ii) any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial and was within the jurisdiction of a single court unless the court ordered a separate trial of the charge of such offense; or

(iii) the same conduct, unless:

(A) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not

required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil; or

(B) the second offense was not consummated when the former trial began.

(2) The former prosecution was terminated, after the indictment was found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the second offense.

(3) The former prosecution was improperly terminated, as improper termination is defined in section 109 of this title (relating to when prosecution barred by former prosecution for the same offense) and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated. 18 Pa.C.S.A. §110

IN THE COURT OF COMMON PLEAS OF THE 37TH JUDICIAL DISTRICT OF PENNSYLVANIA

WARREN COUNTY BRANCH — CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	)	NO. 272 OF 1990
v.	)	
TRACEY JEAN CRANE	)	MOTION FOR BILL PARTICULARS

AND NOW COMES, TRACEY JEAN CRANE, DEFENDANT, by her attorneys, ENTENMANN & SANSONE, GEORGE C. ENTENMANN, ESQUIRE and pursuant to Pennsylvania Rule of Criminal Procedure 304 sets forth the following as their request for Bill of Particulars:

1. Please state the exact dates, places, times and methods by which Tracey Jean Crane allegedly did inflict blunt force trauma to the head of the L.C. as set forth in your information.

2. Please state the fact upon which the information relies in alleging the cause of the victim's severe brain damage and death.

3. Please set forth the conduct of Defendant Tracey Jean Crane which will be relied upon by the Commonwealth in the within proceeding which was also presented by the Commonwealth in the case of Commonwealth Of Pennsylvania vs. Tracey Jean Crane at No. 193 of 1988 in the Court of

Common Pleas in the 37th Judicial District of Pennsylvania, Warren County Branch-Criminal Division.

4. Set forth any conduct of Defendant which will be relied upon by the within action which was not presented in the case of Commonwealth Of Pennsylvania vs. Tracey Jean Crane at No. 193 of 1988.

5. Please set forth the facts which will be relied upon by the Commonwealth in the within proceeding which were also presented by the Commonwealth in the case of Commonwealth of Pennsylvania vs. Tracey Jean Crane at No. 193 of 1988 in the Court of Common Pleas in the 37th Judicial District of Pennsylvania, Warren County Branch-Criminal Division.

6. Set forth any facts which will be relied upon by the Commonwealth in establishing the within action which were not presented in the case of Commonwealth Of Pennsylvania vs. Tracey Jean Crane at No. 193 of 1988.

Respectfully submitted:

ENTENMANN & SANSONE

_____

By: George C. Entenmann, Esquire

IN THE COURT OF COMMON PLEAS OF THE 37TH JUDICIAL DISTRICT OF PENNSYLVANIA

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ANSWER TO MOTION FOR BILL OF PARTICULARS

AND NOW, comes Maureen A. Flynn, Assistant District Attorney of Warren County, in response to the Motion for a Bill of Particulars filed by George C. Entenmann, Esq., on September 17, 1990, and answers the Request for a Bill of Particulars as follows:

1. The blunt force trauma injuries to L.C. occurred on or about November 30 through December 6, 1987. The injuries occurred either by a blow or blows to the head such as a violent hitting action or by repeatedly shaking L.C. violently. These actions were initiated by Tracey Jean Crane.

2. L.C. died as a result of the blunt force trauma to head sustained in December 1987, complicated by hypoxic encephalopathy and terminal myocarditis. As part of the autopsy, there is no evidence of additional recent trauma. On the evening of June 21, 1990, mechanical ventilatory support was removed. The child remained stable for the duration of the evening and throughout the following day. He developed an unstable heart rate and was pronounced dead at 2:29 a.m. on June 23, 1990.

3. The allegations that Tracey Jean Crane inflicted blunt force trauma injuries either by blows to the head such as violent hitting or by repeatedly shaking L.C. violently.

4. No additional conduct of the defendant will be relied upon by the Commonwealth. The consequences of defendant's acts give rise to a sequential wrong which could not have been tried at an earlier time.

5. There were at least two head injuries to L.C. that were caused by Tracey Jean Crane.

6. The injuries to L.C. created a condition of blunt force trauma to the head which caused L.C.'s life to diminish to the point that he could only live by mechanically-induced mechanisms designed to prolong his life. Without those life support systems, L.C. died.

Respectfully submitted,

_____

Maureen A. Flynn
Assistant District Attorney